JD(SF)-06-10
Las Vegas, NV

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

FRESH & EASY NEIGHBORHOOD MARKET INC.

and **Cases 28-CA-22520**
28-CA-22521
28-CA-22670
28-CA-22692

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION

and **Case 28-CA-22675**

DEANA KENTON, an Individual

Joel C. Schochet, Esq., Las Vegas, NV, for
the General Counsel.
Stuart Newman, Esq., Atlanta, GA, and *Molly Eastman, Esq.,*
Chicago, IL, for the Respondent.
David A. Rosenfeld, Esq., Alameda, CA, for the Union.[1]

DECISION

Statement of the Case

Gregory Z. Meyerson, Administrative Law Judge. Pursuant to notice, I heard this case in Las Vegas, Nevada, on November 17 and 18, 2009. This case was tried following the issuance of a Second Consolidated Complaint and Notice of Hearing (the complaint) by the Acting Regional Director for Region 28 of the National Labor Relations Board (the Board) on October 9, 2009. The complaint was based on a number of unfair labor practice charges, as captioned above, filed respectively by the United Food and Commercial Workers International Union (the Union) and by Deana Kenton (Kenton), an individual. It alleges that Fresh & Easy Neighborhood Market, Inc., (the Employer or the Respondent) violated Sections 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.[2]

[1] Counsel for the Union did not appear at the hearing, but did file a post-hearing brief.

[2] In its answer to the complaint, the Respondent admits the various dates on which the enumerated charges were filed by the Union and Kenton, respectively, and served on the Respondent as alleged in the complaint.

Counsel for the General Counsel and counsel for the Respondent appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel, counsel for the Respondent, and counsel for the Union, and my observation of the demeanor of the witnesses,[3] I now make the following findings of fact and conclusions of law.

Findings of Fact

I. Jurisdiction

The complaint alleges, the answer admits, and I find that the Respondent, a Delaware corporation, with offices and places of business in Las Vegas, Nevada, herein called the Respondent's Las Vegas, Nevada stores, has been engaged in the retail sale of groceries, meats, and related products. Further, I find that during the 12-month period ending May 15, 2009, the Respondent, in conducting its business operations as just described, derived gross revenues in excess of $500,000; and during the same period of time, also purchased and received at its Las Vegas, Nevada stores goods valued in excess of $50,000 directly from points located outside the State of Nevada.

Accordingly, I conclude that the Respondent is now, and at all times material herein has been, and employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization

The complaint alleges, the answer admits, and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. Alleged Unfair Labor Practices

A. The Issues

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining an unlawful no-distribution policy, by interrogating its employees about their union activities and sympathies, by creating an impression among its employees that their union activities were under surveillance, and by soliciting employee complaints and grievances and promising to improve terms and conditions of employment if the employees refrained from union organizational activities. Further, it is alleged that the Respondent violated Section 8(a)(3) of the Act by discharging its employees Tamara Williams (Williams) and Deana Kenton (Kenton) because of their support for the Union, and also violated Section 8(a)(4) of the Act by discharging Kenton because she cooperated with the Board in the investigation of unfair labor practices charges filed against the Respondent.

[3] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Manufacturing Company,* 369 US 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

The Respondent denies the commission of any unfair labor practices. It takes the position that while its no-distribution policy as originally worded was not unlawful, it subsequently took affirmative remedial action to correct a wording "mistake" by issuing a new rule to thereby resolve any possible misunderstanding of the policy. Further, the Respondent argues that its stores operate under an "open door" policy, with managers acting affirmatively to solicit employee complaints and then aggressively seeking to remedy those grievances if warranted. It is claimed that this policy pre-dates and is unrelated to the union organizational campaign. This policy is referred to by the Respondent under the terms "Team-Huddle" and "Temperature Check." The Respondent denies any effort to engage in surveillance of its employees' union activity, and contends that it did nothing more than attempt to address employee complaints when employees complained to its managers regarding harassing visits to their homes by union organizers.

Regarding employees Williams and Kenton, the Respondent contends that they were terminated for cause, specifically for violating its absentee policy and practice. It is alleged that these employees failed to appear for their scheduled work shifts or to call into their stores each day to explain their absences, for three or more consecutive shifts, referred to as "no-show/ no-call," and were therefore terminated. The Respondent denies that the terminations of Williams and Kenton were in any way related to their union activity, or that the termination of Kenton was in any way related to her cooperation with the Board.

B. The Facts

The Respondent operates a chain of supermarkets located in Nevada, Arizona, and California. The principal store involved in this proceeding is store number 1247, located in Las Vegas, Nevada. Both Williams and Kenton were originally employed at that store, under the supervision of store manager Barbara Shaw.

Nahal Yousefian-Abyaneh (Yousefian) is the Respondent's Director of Employee Relations. She is the head of the Respondent's group of Employee Relations Managers. In that capacity, 9 employees report to her, including Andrew Taylor, an Employee Relations Manager who has the human resource responsibility for the Las Vegas area stores, including store number 1247.[4] Yousefian testified that she first became aware that the Union was attempting to organize the Las Vegas area stores about April of 2009 [5] when she learned that the Union was contacting certain Las Vegas based employees at their homes. According to Yousefian, one of her team managers learned that a number of these employees were "upset or concerned" about these home visits.

Jonathan English, a store manager trainee, and Beatrice English (English), a store team lead, who are husband and wife, testified that they were contacted at home by a union representative in late March, and that they were very unhappy with being contacted at home. According to English, she reported the incident and her unhappiness to her store manager, Olympia Nauman, who suggested that English write a letter of complaint to the Union. The letter was signed by both husband and wife and expressed their unhappiness with being "harassed" at home, and extreme concern with how the Union had obtained their home address. (G.C. Ex. 10.) At Nauman's request, English gave the letter to her for mailing. English testified that she did not feel pressured to write the letter, and knows of other employees who have written similar letters.

[4] The Respondent's Office of Employee Relations is located in California.

[5] All dates are in 2009 unless otherwise indicated.

Employee Wendy Van Loo testified about an "unwelcome" home visit that she received from union representatives in mid-March. She complained to her store manager, Jamie Lamb, about the incident, and asked him what she could do about it. Lamb suggested that she write a letter of complaint to both the Union and the Respondent's legal department. According to Loo, she did so, subsequently mailing both letters herself. Further, at the trial, counsel for the General Counsel introduced two other employee letters of complaint regarding the visits by union representatives to the these employees' homes, one from an employee signing the letter as "Brenda" (G.C. Ex. 13.), and one from an anonymous "concerned" employee. (G.C. Ex. 12.)

Union organizer Megan Pierce (Pierce) testified that the local union in Las Vegas, Local No. 711, received a number of letters of complaint from the Respondent's employees regarding home visits, mailed to the Local. Counsel for the General Counsel introduced into evidence a number of envelopes addressed to the Local that Pierce testified had contained these letters of complaint. (G.C. Ex. 11.) [6]

The Respondent has maintained an employee no-distribution policy effective from 2006 until September 2, 2009. The "short form" version of that policy, distributed by the Respondent to employees in the employee handbook, stated in part as follows: "We also prohibit the distribution of literature during working time or *on Company premises for any purpose.*" (G.C. Ex. 2.) (emphasis added by the undersigned.) During the same period of time, a "long version" of the no-distribution policy was available to employees on the company intranet.[7] It too contained the same language, specifically that the "[Employer] also prohibits the distribution of literature during working time or *on Company premises for any purpose.*" (G.C. Ex. 3.) (emphasis added by the undersigned.)

However, according to Employee Relations Director Yousefian, "There were a few phrases from the policy that needed clarification, that we changed.…We believed that the phrases, or the language, was too broad and so we needed to clarify it for employees." The change was made on September 3, 2009, and as is reflected in both the short and long form was revised as follows: "We also prohibit the distribution of literature during working time *or at any time in a work area for any purpose.*" (Res. Ex. 8, & G.C. Ex. 4.) (emphasis added by the undersigned.) According to Yousefian, to implement and distribute the revised policy, the Respondent conducted "team huddles" at each of it stores, the revised short form policy was posted in each store, the intranet language was changed, and the employee handbook was modified accordingly. No evidence was offered to rebut the Respondent's assertion that on September 3 the no-distribution language was changed as testified to by Yousefian.

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[6] Counsel for the General Counsel argued at trial that the addresses on the face of these envelopes are all in the same handwriting, and, he further alleged that the return addresses are also all in the same handwriting, and they are returnable to the Respondent's office in California. Although he did not specifically say so, presumably he wants me to take administrative notice of this contention. However, I hereby specifically decline to do so, as such disputed issues are inappropriate for administrative notice. While counsel argued that this constitutes evidence of assistance by the Respondent to anti-union employees, there is certainly no such allegation in the complaint. Further, this alleged assistance is unsubstantiated, and is based on the mere assertion of counsel, not evidence, and is woefully inadequate to establish animus towards the Union.

[7] The Respondent's employee handbook contains the "short form" version of many of its policies. The Respondent's intranet site contains both the short and the "long version" of those policies, including the no-distribution rule.

Michelle Sumner was an employee in store number 1247. She testified that around March or April, she was approached by store manager Shaw who told her that, "[E]veryone is writing a statement about the union harassment, and you need to write yours, because everyone has already written theirs." Apparently, this was related to the complaints made by a number of employees who were unhappy with the home visits by union organizers. However, Sumner did not respond to Shaw's request and never wrote such a statement. Further, she testified that Shaw never mentioned the Union to her again. This conversation occurred on the sales floor. Sumner testified that she was comfortable going to Shaw, who was her supervisor, about anything, including complaints.

While Sumner did not indicate the presence of any other employees, Catherine Everhart, a customer assistant at the same store, testified that she was present during the conversation with Shaw. According to Everhart, Shaw, who was also her supervisor, asked both employees to "write statements because one of the employees was harassed by the Union." In response, Everhart told Shaw that she was not writing a statement, which comment allegedly elicited a "funny" look from Shaw. However, when pressed by the undersigned, Everhart changed her testimony somewhat, adding that Shaw started the conversation by asking, "Has anybody talked to the Union." In any event, Shaw was not called as a witness during the hearing, and, so, the testimony of Sumner and Everhart remain unrebutted.

Further regarding Everhart, on June 15, she, Tamara Williams, and employee Lester Bosiah signed a letter addressed to Tim Mason, the Respondent's CEO. The intention was to present Mason with this letter when he visited the store those employees worked at in Las Vegas. In fact, the letter was ultimately presented to a different management representative. The letter, in summary, requested that the Respondent remain neutral during the union organizing campaign, so that the employees might be able to make a free choice about union representation without "interference and undue influence" from the Employer. (Res. Ex. 1.) At the time of the hearing, Everhart and Bosiah were still employed by the Respondent, Williams having been discharged.

The Respondent is a relatively new corporate entity, created in 2006, with retail operations commencing in November of 2007. Store 1247 in Las Vegas opened in September of 2008. Barbara Shaw was the store manager from the opening until July of 2009, when Bob Megrew succeeded her. Kevin Parker has been the District Manager over store 1247 and others in Las Vegas. Andrew Taylor has been store 1247's Employee Relations Manager since late 2008. He has the same responsibility, as well, for other Las Vegas area stores. Paula Agwu has been an Employee Relations Manager since January of 2008, responsible for, among other things, training new Employee Relations Managers. Both Agwu and Taylor report directly to the Employer's Director of Employee Relations, Nahal Yousefian.

Yousefian testified at length about the Employer's open door policy and its efforts to check in regularly at its various stores to determine how things are going. The written job description of the Employee Relations Manager stresses that the manager is to be "an advocate" for the employees, visiting the stores regularly to "check the pulse" and "see how things are going." (Res. Ex. 5.) According to Yousefian, 50% of the job duties of an Employee Relations Manager consist of going out and "soliciting" employee problems, issues, and concerns, and "helping resolve them." She referred to this conduct as "temperature checks."

Yousefian described this hands on approach where Employee Relations Managers go into stores and "talk to employees, work shoulder-to-shoulder with them." The managers are expected to ask, "[H]ow is everything going," and to ask whether the employees "have any

issues, problems, concerns." It is expected that in response the employees may raise any work related issues, including pay and fair treatment. Further, and most significant, the managers are expected to directly remedy many grievances.

According to Yousefian, upon visiting a store, if the manager learns of a minor issue or concern that can be resolved "right then and there," the manager is expected to just resolve it. Where the issue is more complex, involves a number of employees, or perhaps the entire store, the manager is expected to give Yousefian a report. Further, the Employee Relations Manager is expected to "partner up" with the District Manager for that particular store and then together assemble a plan to address the issue raised by the employees.

Additionally, when visiting a store, the management team, including the store manager, the District Manager, and the Employee Relations Manager may engage the employees in a group discussion of those issues of concern to the employees. This collective approach to problem solving is referred to as the "team-huddle policy." Yousefian testified that this open door, hands on approach to problem solving has been actively used by the Employer with its employees since the first store was opened, and continues to be utilized to date.

The record evidence establishes that Taylor first visited store 1247 no later than December 12, 2008, and during that visit he discussed with the employees issues of concern to them. Further, the evidence indicates that Taylor attempted to immediately resolve those concerns, which included security, inadequate staffing, and benefits information. (Res. Ex. 51.) Yousefian testified that Taylor has continued to conduct such visits to those stores that he is responsible for, including store 1247, for the entire period of time of his employment, through the date of the hearing. She reiterated that such visits and "temperature checks" constituted a significant part of his job duties as an Employee Relations Manager. This visit apparently pre-dated the union organizing campaign at the store.

On April 24, 2009, Sheritha Grose, a team lead at store 1247, sent an email with an attached written statement to the Respondent's Employee Relations Department raising concerns about a scheduling issue that she had with store manager Shaw. This complaint involved a number of employees including Grose. (Res. Ex. 10.) Yousefian testified that in response, the store was visited by Taylor and Agwu. It is the Respondent's contention that this visit by the two Employee Relations Managers was a "temperature check" related to Grose's complaint, and totally unrelated to the union organizing campaign, or to the union activity of any of the employees who worked at the store.

Customer assistant Catherine Everhart testified that in April she met Taylor and Agwu when they first entered store 1247. According to Everhart, Taylor and Agwu introduced themselves, and asked her "if everything was okay, and if [she] had any issues." She responded that she was "okay," to which Taylor asked, "Just okay?" Agwu asked if there was anything that they could do to "fix" things. Everhart allegedly responded that "there were some issues with hours for lunches." Both Taylor and Agwu responded that they could "fix it." Then, according to Everhart, she was asked how she felt about the people that she worked with, to which she responded that she liked them. The conversation then ended as she became busy bagging groceries. Everhart testified that there was no mention of the Union during this conversation.

Later in the day, Taylor and Agwu held a meeting for employees in the store stockroom. Besides Everhart, also present for the meeting were District Manager Kevin Parker, a number of team leads, and other customer assistants. Shaw was apparently not present, as she went to service customers at the front of the store. According to Everhart, Agwu started the meeting by

saying that "they were there for us." Further, Agwu allegedly told the assembled employees that they knew that "there were issues in the store." However, Agwu did not say what those issues were, other than they were "private." Everhart thinks that Parker "might have said something" about the "issues in the store" being "resolved after investigation." Other than that, Everhart could not recall anything else that was said at the meeting.

During cross-examination by counsel for the Respondent, Everhart acknowledged that she believed the reason that Taylor and Agwu came to the store in April was because Sheritha Grose had some issues with store manager Shaw, and Grose had contacted employee relations to complain. As Agwu and Parker did not testify at the hearing, and Taylor, who did testify, did not discuss his visit to store 1247, Everhart's testimony remains unrebutted.

The Respondent maintains a written attendance policy, both short-form (Res. Ex. 2.) and long-form (G.C. Ex. 7.) The long-form attendance policy states in part: "Additionally, if you don't show up for work on three consecutive scheduled days, and we haven't heard from you, we'll consider you to have abandoned your job and resigned." The short-form attendance policy says in part essentially the same thing: "And if you don't show up without calling in for work on three consecutive scheduled workdays, we'll consider you to have abandoned your job and resigned." The Respondent's managers refer to this portion of its attendance policy as "no-show/no-call."

However, the General Counsel and the Respondent disagree as to the meaning of the "no show/ no call" portion of the attendance policy. Counsel for the General Counsel argues that the literal reading of those provisions clearly shows that an absent employee need only call into his store once every three days. The General Counsel argues in his post-hearing brief that the language from the long-form attendance policy, specifically that "if you don't show up for work on three consecutive scheduled days and we haven't heard from you, we will consider you to have abandoned your job and resigned," implies that a single contact would be sufficient. Further, counsel argues that consecutive days missed for the same reason should only count as one absence. In support of its argument, counsel cites page 2 of the long-form attendance policy where in part it states: "Consecutive days missed due to the same or related illness, injury or personal situation are considered recurring and will count as one absence." (G.C. Ex. 7, p. 2.)

When testifying, Yousefian admitted that the policy "doesn't stipulate in this [long-form] version" that employees are required to call in each day they are absent. However, the Respondent, through Yousefian and Taylor, insisted that in applying its attendance policy, its normal practice has been to terminate the employment of an employee who misses three or more consecutive shifts without calling in before each shift. Yousefian testified that when employees first start work, the requirement that they call in for each day they have an unscheduled absence is communicated to them by management. However, even though the employees are forewarned when hired, Taylor testified that before terminating a no-show/no-call employee for job abandonment, an effort is made to "try to reach out to them to establish the reasons for the absence," by calling the individual employee or an emergency contact number.

In an effort to demonstrate its normal practice concerning the termination of employees for job abandonment, the Respondent introduced termination documents for 31 employees who had been employed in its Nevada stores. (Res. Ex. 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 25, 26, 27, 28, 29, 30, 32, 34, 35, 37, 38, 39, 40, 43, 44, 45, 46, 47, 48, 49, and 50.) Of those 31 employees who were terminated for job abandonment, 13 were specifically fired for no-show/no-call violations. (Res. Ex. 11, 17, 18, 23, 25, 26, 30, 34, 43, 44, 46, 48, and 49.)

Further, according to Yousefian's testimony, two former employees, David Sexton [8] and Anthony Tienda, were terminated under the Respondent's attendance policy because of jail-related absences. (Res. Ex. 34 and 39.) This is significant because, as will be discussed in detail below, both Deana Kenton and Tamara Williams were absent from work due to incarceration in the county jail.

Counsel for the General Counsel in cross-examining Yousefian was able to demonstrate certain book keeping, payroll, recording, and processing errors for some of the employees who were terminated for job abandonment. However, for the most part, the records demonstrate that the Respondent has a normal procedure that it follows in terminating employees for job abandonment and, in particular, for no-show/no-call absences. That procedure results in the termination of an employee who fails to call in for each and every shift where there are three or more consecutive absences.[9] In his post-hearing brief, counsel for the General Counsel did not make a serious attempt to demonstrate that such a policy and practice, as supported by the voluminous termination documents, was not in effect.

Tamara Williams was hired as a customer assistant at store number 1247 on September 8, 2008. As noted earlier, Williams, Catherine Everhart, and Lester Bosiah all signed a paper dated June 15, 2009, and addressed to the Respondent's CEO, Tim Mason, which requested that the Respondent remain neutral during the Union's organizing campaign. (Res. Ex. 1.) This letter was ultimately presented to one of the Respondent's managers at the store where Williams worked.

The North Las Vegas Police arrested Williams at a park in the early morning hours of June 24, 2009. According to Williams, she was informed by the police that there was an outstanding warrant for her arrest for failure to pay a $400 ticket she had received five years earlier, when she was 17.[10] From jail she called Erica Vidal, the team lead at her store. She asked Vidal to lend her $400, which Vidal declined to do. Williams next asked Vidal to tell the store manager, Bob Megrew, that she would be in jail for a few days, and Vidal agreed to do so.

Williams was incarcerated for ten days, during which time she did not attempt to again contact store 1247. While initially testifying that she could not call the store from jail, on cross-examination she acknowledged that she did have the ability to make collect telephone calls from jail. Because of her incarceration, Williams was unable to report for her scheduled work shifts on June 25, 27, 28, and July 1, 2009. (G.C. Ex. 5.) Following her call to Vidal on June 24, she did not thereafter make any attempt to contact the store prior to her next four shifts.[11]

When Williams was released from jail on July 3, she went home and called store manager Megrew. She asked him whether she still had a job, to which he responded, "Unfortunately not." Later that day, she received a termination letter dated July 2 and signed by Taylor, which stated that she had been terminated for "job abandonment." (G.C. Ex. 8.)

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[8] Although Sexton was subsequently rehired, Yousefian testified that this was a mistake due to the Regional Manager's failure to follow correct procedures during a mass hiring.

[9] Of the 13 no-show/no-call terminations, three were ambiguous as to the number of shifts missed where the employee failed to call in. (Res. Ex. 18, 43, and 49.)

[10] Williams testified that she had received the ticket because she had remained on a bus for a distance beyond that for which she had paid.

[11] Apparently, Williams was scheduled to work a shift on June 24, however, since she called Vidal prior to the start of that shift, the Respondent did not consider her absence on that date to constitute a no-show/no-call absence.

Taylor testified that District Manager Kelvin Parker made the ultimate decision to terminate Williams after receiving advice from the store manager where Williams worked and from Taylor himself. On July 1, the store manager-in-training at store 1247, Vanessa Retchless, sent an email to Taylor, advising him of the situation with Williams, specifically that she had missed her scheduled shifts since June 25 with no contact from her to the store. Further, Retchless advised that she had tried without success to call Williams. (G.C. Ex. 5.)

Taylor in turn sent an email to his boss, Yousefian, explaining the Williams situation, specifically that Williams had missed four shifts without contacting the store prior to the shifts. According to Taylor, he had not been able to reach her by phone, and no emergency contact number was available. He recommended that she be terminated. (G.C. Ex. 5.) Yousefian agreed with Taylor's recommendation, and Taylor forward the recommendation on to Parker and store Manager Megrew. As noted above, it was Taylor who actually signed the letter of termination sent to Williams.

Deana Kenton was hired as a customer assistant at store 1247 on September 8, 2008. In December of 2008, Kenton was notified that she had been admitted to the Respondent's "Options Program," which seeks to prepare employees, who have applied, to move into management positions, such as team leads. According to Kenton, she received good job evaluations and good reports on her progress in the Options Program from store manager Shaw. (G.C. Ex. 14 and 15.)

In early May, Kenton had a conversation with Shaw about the fact that her work hours had been reduced. Kenton was unhappy with the reduction, and questioned how she could "get [her] Option Program work done with [only] 20 hours [of work] a week." It was during this conversation that Kenton brought up the subject of the Union. She complained about the reduction in her hours of work and then stated that, "This is why we need a union." Shaw apparently did not respond to Kenton's comment about the Union, and they never discussed the Union further.

As part of her training for the Options Program, Kenton received regular reviews from Shaw and District Manager Kelvin Parker. However, according to Kenton, at about the time that she mentioned the Union to Shaw, she ceased having those regular reviews. Kenton testified that shortly thereafter, in June of 2009, she was assigned to help perform a "refit" overnight at store number 1249. She was in the break room of that store when she observed a hand-written message on a white board that said, if employees wished union representatives to stop coming to their homes, the employees could "write statements so that we could put an end to this." [12]

During June, Kenton transferred to store number 1035. The store manager there was Daemon Smith. Kenton attempted to continue her participation in the Options Program, and complains that her continued participation was delayed until July 27. She further complains that although she was allowed to continue in the program, she was required to complete much of the paper work again.

In his post-hearing brief, counsel for the General Counsel contends that Kenton corresponded with Taylor via email on the subject of the Union. It was during counsel's cross-examination of Yousefian that she testified that Taylor had told her about such emails. Further, Yousefian testified that from her conversation with Taylor, she got the impression that Kenton

[12] Presumably, this evidence is offered to support the General Counsel's contention that the Respondent exhibited animus towards the Union.

thought that the Union was "an important entity." Counsel then offered the emails between Kenton and Taylor, where the Union was apparently discussed, into evidence. However, I sustained counsel for the Respondent's objections to the admission of these documents into evidence, and rejected them. At the request of counsel for the General Counsel, I allowed the emails to be placed in a rejected exhibit file. (G.C. Rej. Ex. 17.)

It is important to note that counsel for the General Counsel called Kenton to testify in his case in chief, and she did testify at some length. However, for some inexplicable reason, counsel for the General Counsel did not ask Kenton about this email communication between her and Taylor where the Union was apparently discussed, did not ask her to identify the emails, and did not move for their admission into evidence while she was testifying.

Further, in his case in chief, counsel for the General Counsel also called Taylor and Yousefian to testify under rule 611(c) of the Federal Rules of Evidence. However, again for some inexplicable reason, counsel for the General Counsel did not ask either Taylor or Yousefian about the email communication between Kenton and Taylor where the Union was apparently discussed, did not ask either witness to identify the emails, and did not move for their admission into evidence while either witness was testifying during the General Counsel's case in chief.

It was not until the following day that counsel for the General Counsel apparently decided that he had neglected to offer these emails into evidence, which may have potentially been an important part of the General Counsel's case. Earlier, counsel for the General Counsel had represented that he only had one additional witness to call, but that witness had not appeared to testify. However, instead of resting his case, as he had earlier indicated he would do, counsel for the General Counsel asked permission to recall Kenton and/or Taylor, apparently in an effort to introduce the emails into evidence. Neither Kenton nor Taylor was present in the hearing room at that time. Counsel for the Respondent represented that Taylor was on a plane heading to California, where he resides, and counsel for the General Counsel represented that he could perhaps have Kenton present in the hearing room in approximately one and a half hours.

Counsel for the Respondent strongly objected to counsel for the General Counsel being permitted to recall witnesses, who the General Counsel had called the previous day, for the purpose of asking them questions regarding the emails and offering those emails into evidence, which the General Counsel could have previously done. Further, he objected as neither witness was present in the hearing room and prepared to testify. Counsel for the General Counsel argued that he had not formally rested, and that any mistake that he had made should not prejudice Kenton. He asked for a postponement to bring Kenton or Taylor back to testify.

I denied counsel for the General Counsel's request for a postponement. Taylor had left the State and Kenton was not present and, according to counsel, would not be available for at least 90 minutes. The General Counsel was not prepared to go forward, but even had he been ready, in light of counsel for the Respondent's objection, I would have denied him permission to recall witnesses. As I explained to counsel for the General Counsel, the Board's unfair labor practice hearings are adversarial proceedings. Counsel for the General Counsel had a full opportunity to question both Kenton and Taylor about the emails in issue and to offer those emails into evidence. He simply failed to do so. Allowing him a day later to recall those witnesses would have prejudiced the Respondent. Therefore, I denied his request. Having no further witnesses available to present, I considered that counsel for the General Counsel had rested, and I directed counsel for the Respondent to begin his case in chief.

In his case in chief, counsel for the Respondent called Yousefian to testify. It was during counsel for the General Counsel's cross-examination of Yousefian that counsel attempted to have the emails between Kenton and Taylor admitted as an exhibit. As noted above, I sustained the Respondent's objection and denied the admission of the emails, but permitted them to be placed in the rejected exhibit file. Counsel for the Respondent objected to the admission of the emails through Yousefian as improperly permitting counsel for the General Counsel to do through the "back door" what he failed to do through the "front door," namely to offer the documents for admission in his case in chief through the testimony of either Taylor or Kenton. Agreeing with counsel for the Respondent's objection, I sustained it.

In his post-hearing brief, counsel for the General Counsel contends that Kenton provided an affidavit to the Board in connection with one of the earlier charges in this combined case; and that the Respondent was aware of Kenton's cooperation with the Board since counsel for the General Counsel himself sent a letter to counsel for the Respondent mentioning Kenton's name, and requesting evidence in response to the allegations in those charges. At the trial in this matter, counsel for the General Counsel moved for the admission into evidence of the letter that he purportedly sent to counsel for the Respondent during the investigation of these charges, seeking evidence in response to certain claims being made by Kenton.[13] Counsel for the Respondent objected to the admission of said letter.

Once again, counsel for the General Counsel inexplicably failed to question Kenton about her cooperation with the Board when he had the chance to do so during his examination of Kenton in his case in chief. Counsel could have easily asked Kenton whether she furnished an affidavit to the Board in connection with this case, and could have questioned the Respondent's managers concerning their knowledge of such cooperation. However, he did no such thing. Instead, counsel for the General Counsel attempted to involve himself in the evidentiary portion of the case, as he offered his own letter, purportedly sent to counsel for the Respondent, as evidence of Kenton's cooperation with the Board and of the Respondent's knowledge of such cooperation.

It was improper for counsel for the General Counsel, as the representative and advocate of a party to this proceeding, to have attempted to involve himself in the substantive allegations of this case.[14] I sustained counsel for the Respondent's objection to the admission of the letter from counsel for the General Counsel, which was purportedly sent to counsel for the Respondent. However, at the request of counsel for the General Counsel, I allowed the letter to be placed in the rejected exhibit file. (G.C. Rej. Ex.16.)

On the evening of August 27, 2009, Kenton was arrested by the Las Vegas Police on a charge of domestic violence. Kenton was scheduled to work the following morning, but was apparently not permitted to make telephone calls until later in the day. After the start of her shift, Kenton was able to speak by phone with Edwin Poindexter, the team lead at store 1035. According to Kenton, she told Poindexter that she was in jail and would not be able to work until released. She testified that Poindexter told her not to worry and that her job would be fine. However, Poindexder testified that when told Kenton was in jail he responded that he hoped

[13] Counsel for the General Counsel obviously sought admission of this letter into evidence in support of the Section 8(a)(4) allegation in the complaint.

[14] If the admission into evidence of counsel's letter was essential to the General Counsel's case, it would have been prudent for the case to have been tried by a representative of the General Counsel's office who had not authored the letter in question.

that it was not too serious. Allegedly she said that the problem would be corrected within the next few days. According to Poindexter, he ended the conversation by saying, "I wish you the best of luck."

Apparently just prior to Kenton's call on August 28, Kenton's aunt had contacted the store with the information that she had been arrested. It is unclear from the evidence whether the aunt thereafter contacted the store with an update on Kenton's status. However, what is clear is that Kenton never re-contacted the store to say that she would not be working her shifts because she remained incarcerated. She testified that while in jail she did have the ability to make collect telephone calls.

Starting on August 30, the Respondent's managers exchanged a series of emails regarding Kenton's status. These emails were sent or received by Kelvin Parker, Andrew Taylor, Daemon Smith, and Paula Agwu and went through the period of September 2. A review of the correspondence shows that the mangers were trying to decide what should happen to Kenton for having missed an increasing number of shifts without having contacted the store before each shift to report her absence. As of August 30, Daemon Smith indicated to Agwu that Kenton had missed 3 shifts without contacting the store prior to the commencement of each shift. Smith stated his belief that 3 such no-show/no-call absences constituted job abandonment. The emails culminated in a September 2 message from Taylor to Smith in which Taylor indicated that he had unsuccessfully tried to contact both Kenton and her emergency contact family member. Taylor directed that they should go forward with the decision reached earlier to terminate Kenton's employment. (G.C. Ex. 6.)

Taylor testified that District Manager Parker made the final decision to terminate Kenton, but whether the decision was made by Parker, Smith, Taylor, or collectively by the managers, the termination letter signed by Taylor on September 2 indicates the termination is the result of job abandonment. According to Taylor, shortly after the letter was sent, he received a call from Kenton who had been released from jail. While Kenton testified that upon being released from jail she attempted to determine her employment status by contacting a number of managers, the sequence of contacts is unimportant. More to the point, it is undisputed that she and Taylor spoke sometime on September 2, the day she was released from jail.

Taylor informed Kenton that she had been terminated by her store's managers for job abandonment, having missed at least three shrifts without calling into the store. Kenton pointed out that when she was first arrested she had called the store and spoke with team lead Poindexter to say that she would not be coming into work. Taylor asked her if she had called into the store before the commencement of each shift that she missed, to which she responded no. According to Kenton, she then volunteered her opinion that she had been fired because of her union activity, which Taylor denied.

C. Analysis and Conclusions

1. Alleged Section 8(a)(1) Conduct

Paragraphs 5(a) and 7 of the complaint allege that the Respondent has since at least November 18, 2008, maintained in its employee handbook a rule that violated Section 8(a)(1) of the Act. As is stated in counsel's post-hearing brief, the General Counsel contends that this handbook provision, constituting a no-distribution policy, was overly-broad and, as such, unlawful. Specifically, counsel's brief makes it clear that the rule is overly-broad because it prohibited the "distribution of literature during working time *or on Company premises for any purpose.*" (emphasis added.)

As is set forth in detail above in the fact section of this decision, prior to September 3, 2009, the Respondent maintained a "short-form" rule in its employee handbook and a "long-form" rule on its company intranet site, both of which contained language that included a prohibition on "the distribution of literature during working time *or on Company premises for any purpose."* It is the italicized portion of the clause (highlighted by the undersigned), which the General Counsel contends is overly-broad and, thus, unlawful.

The Respondent does not deny the existence of this rule, but argues that it should not be construed as unlawful, as in practice it did not limit or chill the employees' Section 7 rights. Counsel for the Respondent argues that as there is no evidence that the Employer ever disciplined any employee for distributing literature on company premises during non-work time, the policy should not be considered unlawful. In any event, the Respondent argues that as of September 3, the allegedly unlawful language in the rule was corrected to replace "Company premises" with "work area," and affirmatively stated that employees may not distribute materials only during "working time" or "at any time in a work area." [15] While the General Counsel does not contend that the revised language is unlawful, he does not acquiesce with the Respondent's contention that it "cured" the alleged violation of the Act by issuing the revised language and by notifying its employees of the rescission.

I am of the view that the rule in question was clearly unlawful. The Board has said that, "A rule prohibiting distribution of literature on employees' own time and in nonworking areas is presumptively invalid…A no-distribution rule which is not restricted to working time and to work areas is overly broad and presumptively unlawful…The mere existence of an overly broad rule of this kind tends to restrain and interfere with employees' rights under the Act, even if the rule is not enforced." *TeleTech Holdings, Inc.,* 333 NLRB 402, 403 (2001) (citations omitted).

Thus, the rule as originally written, both in short-form and long-form, prohibiting the distribution of literature on *Company premises for any purpose* was unlawful on its face. The Board has said that, "When a rule of this kind is found presumptively unlawful on its face, the employer bears the burden to show that it communicated or applied the rule in a way that conveyed a clear intent to permit distribution of literature in nonworking areas during nonworking time." *Id.* While the Respondent claims that it never enforced the rule, as no employees were ever disciplined for its violation, this falls far short of the Board's standard. Although employees may not have been disciplined under the rule, there is no way to know what a chilling effect the rule may have had on the exercise of employee rights. There is no evidence to show that while the rule was in effect the Respondent made any effort to explain to its employees their right to distribute literature during nonworking time in nonworking areas. Accordingly, the Respondent has not met its burden.

Further, the Board held that, "a finding of a disclaimer of the invalid rule would require that the Respondent demonstrate that it clearly disavowed or repudiated it." *Id.* This is critical in the case at hand, as the Employer argues that as of September 3 it did disavow and repudiate the old rule, by issuing a new distribution rule containing lawful language. In addition, the Respondent notified its employees of the revised rule through means of "team huddles" at each of its stores, by posting the new rule in those stores, and by changing the language of the rule in its employee handbook and on its intranet site.

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[15] The revised language reads as follows: "We also prohibit the distribution of literature during working time *or at any time in a work area for any purpose."* (emphasis added.)

In its post-hearing brief, the Respondent cites *Passavant Memorial Area Hospital,* 237 NLRB 138, 138-139 (1978) for the proposition that by issuing its revised no-distribution policy, it effectively cured any violation of the Act caused by its pre-September 3 policy. Under *Passavant*, an employer may relieve itself of liability from unlawful conduct by: (1) repudiating that conduct—as long as such repudiation is timely, unambiguous, and specific to the coercive conduct; (2) adequately publishing the repudiation to the employees; (3) not engaging in any further proscribed conduct; and (4) giving employees assurances that in the future, the employer will not interfere with the exercise of their Section 7 rights.

It does appear that the post-September distribution language is lawful, that it was well disseminated to the employees, who were appropriately informed that it was a replacement for the earlier distribution language, and should have served as notice to those employees of their right to distribute literature in accordance with Section 7 of the Act. Counsel for the General Counsel does not challenge any of these assertions. However, he argues in his post-hearing brief that any such disavowal or repudiation of the unlawful rule was not done in a timely manner, such that it would cure the Respondent's violation of the Act. I agree.

The Respondent's unlawful distribution rule was in effect for a significant number of months, at least ten months, from the November 18, 2008, the date specified in the complaint, until the revised rule issued on September 3, 2009.[16] Thus, the unlawful rule was in effect during the period of time that the Union was engaged in an organizing campaign. The existence of such an unlawful rule may well have had a chilling effect on the willingness of union supporters to engage in the distribution of pro-union literature. In my opinion, the interference with Section 7 rights was significant. Ten months is a considerable period of time, especially during an organizing campaign, and although the Respondent eventually revised its rule to ensure that it was no longer violating its employees' rights, the corrective action was "to little to late." The corrective action was not timely and, thus, did not cure the Respondent's unfair labor practice under *Passavant, supra.*

Accordingly, I conclude that by promulgating and maintaining in its employee handbook and on its intranet site an unlawful no-distribution rule, the Respondent violated Section 8(a)(1) of the Act, as alleged in paragraphs 5(a) and 7 of the complaint.

It is alleged in complaint paragraphs 5(a)(1), (2), and 7 of the complaint that in early April of 2009, the Respondent, through its store manager, Barbara Shaw, interrogated its employees about their union activity, and created an impression among them that their union activities were under surveillance, in violation of Section 8(a)(1) of the Act. As was noted above in the fact section of this decision, employees Michelle Sumner and Catherine Everhart both testified that during March or April of 2009, they had conversations with Shaw during which the Union was mentioned. Saw did not testify, and, so, the testimony of the employees remains largely unrebutted.

According to Sumner, while at work on the sales floor in her store, she was approached by Shaw who told her that, "[E]veryone is writing a statement about the union harassment, and you need to write yours, because everyone has already written theirs." Above, in the fact section of this decision, I describe at length the complaints that a number of employees made about the uninvited visits to their homes by union organizers. When they raised their complaints

[16] The Respondent does not deny that the original distribution rule was in effect for at least this period of time.

to certain of the Respondent's managers, some of them were told to put the complaints in writing and send them to the Union. Apparently, this was the reference that Shaw was making in her conversation with Sumner. Sumner testified that she did not respond to Shaw's request and never wrote such a statement. Further, she testified that Shaw never mentioned the Union to her again. Regarding her relationship with Shaw, Sumner said that she was comfortable going to Shaw, who was her supervisor, about anything, including complaints.

Although Sumner indicated that she and Shaw were alone during the conversation, employee Everhart testified that she also was present during this conversation. According to Everhart, Shaw, who was also her supervisor, asked both employees to "write statements because one of the employees was harassed by the Union." In response, Everhart told Shaw that she was not writing a statement, which comment allegedly elicited a "funny" look from Shaw. Later Everhart's testimony changed somewhat as she claimed that Shaw started the conversation by asking, "Has anybody talked to the Union?"

I do not believe that Sumner's failure to recall that Everhart was present during their conversation with Shaw was particularly significant. I assume that she merely forgot. I found both Sumner and Everhart reasonably credible, and their respective stories about what Shaw said were for the most part consistent with each other. Both versions of the conversation supported the central theme that Shaw asked them to furnish statements about their contacts with the Union. The Respondent failed to call Shaw to testify, which I assume and conclude was because had counsel done so, Shaw would have confirmed the testimony of Sumner and Everhart.

In determining whether a supervisor's questions to an employee about her union activities were coercive under the Act, the Board looks to the "totality of the circumstances." *Rossmore House,* 269 NLRB 1176 (1984), aff'd. *sub nom. HERE Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985). In *Westwood Health Care Center,* 330 NLRB 935 (2000), the Board listed a number of factors considered in determining whether alleged interrogations under *Rossmore House* were coercive. These are referred to as "Bourne factors," so named because they were first set forth in *Bourne v. NLRB, 332 F.2d 47, 48 (2nd Cir. 1964).* These factors include the background of the parties' relationship, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and the truthfulness of the reply.

Applying the "Bourne factors" to the matter at hand, Shaw was the store manager, an admitted supervisor, at the store where both Sumner and Everhart worked. To a very large extent, she controlled their future with the Respondent. As the Respondent's counsel made clear through the course of the hearing, it is the store manager who determines disciplinary action involving the store employees, with company human resources managers acting only in an advisory capacity. That having been said, it did appear from their testimony that both Sumner and Everhart had a reasonably good relationship with their manager. Still, Sumner testified that she did not respond to Shaw's request for a statement. Everhart was more candid and direct, simply declining to write such a statement. In the case of both employees, there was no indication that they had ever previously discussed the Union with Shaw, or that she was aware of their sentiments towards the Union. While Sumner's level of support for the Union is unknown to the undersigned, Everhart was an open union supporter. As noted earlier, she signed a letter addressed to the Respondent's CEO seeking the Employer's neutrality during the organizing campaign. However, that letter was dated June 15, at least several months after the conversation in question. (Res. Ex. 1.)

While the issue is not clear cut, balancing the various factors, I conclude that the totality of the circumstances weighs in favor of concluding that the conversation Shaw had with Sumner and Everhart was coercive in nature. In the course of asking them to furnish written statements about harassment from the Union, she was really questioning them about their contacts with the Union and their support for the Union's organizational campaign. For all practical purposes, she was interrogating them regarding their union activity. In doing so, Shaw was interfering with, restraining, and coercing Sumner and Everhart in the exercise of their Section 7 rights. Accordingly, I find that the Respondent has violated Section 8(a)(1) of the Act, as alleged in complaint paragraphs 5(b)(1) and 7.

Further, I believe that this same conversation created the impression among Sumner and Everhart that their union activities were under surveillance by the Respondent. Shaw approached them. They did not come to her complaining about uninvited home visits by union organizers. In so doing, Shaw was, at a minimum, telling these employees that the Respondent was aware that the Union's organizing campaign included visits to employees' homes.

The test for whether an employer creates an unlawful impression of surveillance is whether, under the circumstances, an employee could reasonably conclude that her union activities are being monitored. *Mountaineer Steel Inc.,* 326 NLRB 787 (1998), enfd. 8 Fed. Appx. 180 (4th Cir. 2001). What other conclusion could Everhart and Sumner have reached when Shaw asked them to write a statement concerning union harassment, which they likely knew related to home visits by union organizers. Even assuming there had been no such visits to their homes, they were certainly left with the impression that management believed that union organizers had been to see them. Certainly this left them in an uncomfortable position. The Board has held that under the Act "[e]mployees should not have to fear that 'members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways.'" *Conley Trucking,* 349 NLRB No. 30 (2007), quoting *Fred'k Wallace & Son, Inc.,* 331 NLRB 914 (2000).

Shaw's statement to Sumner and Everhart really left them in an untenable position, believing that management was watching employees and was interested in knowing whether they had any contacts with the Union. However, even assuming they were not personally worried about surveillance, merely leaving them with that impression constituted a violation of the Act. The Board applies an "objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect." *Miller Pump & Plumbing,* 334 NLRB 824 (2001). In any event, I believe that Sumner and Everhart would have reasonable believed that the Respondent was interested in knowing about their union activity. To this extent, Shaw's remarks clearly interfered with the employees' exercise of their Section 7 rights.

Based on the above, I conclude that the Respondent had created an impression among certain of its employees that their union activities were under surveillance. Such conduct constitutes a violation of the Act, as alleged in paragraphs 5(b)(2) and 7 of the complaint.

Complaint paragraphs 5(c) and 7 allege that in about late April of 2009, the Respondent, through Andrew Taylor and Paula Agwu, at its East Lake Mead Boulevard, Las Vegas, Nevada store[17] solicited employee complaints and grievances, and promised its employees improved terms and conditions of employment if they refrained from union organizational activity in violation of Section 8(a)(1) of the Act.

[17] This is the Respondent's store number 1247.

There is a long line of Board and court cases that stand for the proposition that an employer with an established practice of soliciting and resolving employee grievances may continue that practice during an organizing campaign. *Johnson Tech., Inc.,* 345 NLRB 762, 764 (2005) ("It is well established that an employer with a past practice of soliciting employee grievances may continue such a practice during a union's organizational campaign."); *TNT Logistics N. Am., Inc.,* 345 NLRB 290 (2005) (no violation during ongoing union organizing campaign where employer had a past practice of soliciting grievances through an "open door" policy); *Wal-Mart Stores, Inc.,* 340 NLRB 637, 640 (2003) ("It is well established that an employer with a past practice of soliciting employee grievances through an open door or similar-type policy may continue such a policy during a union's organizational campaign."); *Curwood, Inc.,* 339 NLRB 1137 (2003), aff'd in part, vacated in part, 397 F.3d 548 (7th Cir. 2005) (employer's continued practice of allowing employee questions did not violate the Act); *see also MacDonald Mach. Co.,* 335 NLRB 319 (2001). Of course, the question that must be answered in the case before me is whether the Respondent had such a past practice at its various stores.

The unrebutted evidence supports the conclusion that the Respondent did in fact have a past practice of soliciting employee complaints, and remedying those complaints when possible. The Employer's Director of Employee Relations, Nahal Yousefian, testified credibly about its open door policy, and its requirement that its Employee Relation Managers "check in" regularly at its various stores to determine how things are going. As is more fully discussed above in the fact section of this decision, such visits are considered as "temperature checks," where the managers spend 50% of their time "soliciting" employee problems, issues, and concerns, and attempting to resolve them.

Upon visiting a store, if a manager learns of a minor issue or concern that can be resolved "right then and there," the manager is expected to just resolve it. Where the issue is more complex, involves a number of employees, or perhaps the entire store, the manager is expected to give Yousefian a report. Further, the Employee Relations Manager is expected to "partner up" with the District Manager for that particular store and then together assemble a plan to address the issue raised by the employees.

Additionally, when visiting a store, the management team, including the store manager, the District Manager, and the Employee Relations Manager may engage the employees in a group discussion of those issues of concern to the employees. This collective approach to problem solving is referred to as the "team-huddle policy." Yousefian testified that this open door, hands on approach to problem solving has been actively used by the Employer with its employees since the first store was opened, and continues to be used to date.

The record evidence establishes that Taylor first visited store 1247 no later than December 12, 2008, and during that visit he discussed with the employees issues of concern to them. Further, the evidence indicates that Taylor attempted to immediately resolve those concerns, which included security, inadequate staffing, and benefits information. (Res. Ex. 51.) There was no evidence that at that time the Union was actively attempting to organize this store, or that the visit was in any way related to union activity. Yousefian testified that Taylor has continued to conduct such visits to those stores that he is responsible for, including store 1247, through the date of the hearing. She reiterated that such visits and "temperature checks" constituted a significant part of his job duties as an Employee Relations Manager.

It appears that it was a very specific complaint that brought Taylor to store 1247 in April of 2009. On April 24, Sheritha Grose, a team lead at store 1247, sent an email with an attached written statement to the Respondent's employee relations department raising concerns about a scheduling issue that she had with store manager Shaw. This complaint involved a number of

employees including Grose. (Res. Ex. 10.) Yousefian testified that in response, the store was visited by Taylor and Agwu. It is the Respondent's contention that this visit by the two Employee Relations Managers was a "temperature check" related to Grose's complaint, and totally unrelated to the Union's organizing campaign, or the union activity of any of the employees who worked in the store.

Customer assistant Catherine Everhart testified that in April she met Taylor and Agwu when they first entered store 1247. The evidence indicates that this was the April 24 visit. According to Everhart, Taylor and Agwu introduced themselves, asked her "if everything was okay, and if [she] had any issues." She responded that she was "okay," to which Taylor asked, "Just okay?" Agwu asked if there was anything that they could do to "fix" things. Everhart allegedly responded that "there were some issues with hours for lunches." Both Taylor and Agwu responded that they could "fix it." Then, according to Everhart, she was asked how she felt about the people that she worked with, to which she responded that she liked them. The conversation then ended as she became busy bagging groceries. Everhart testified that there was no mention of the Union during this conversation.

Later that same day, Taylor and Agwu held a meeting for employees in the store stockroom. Besides Everhart, also present for the meeting were District Manager Kevin Parker, a number of team leads, and other customer assistants. Store manager Shaw was apparently not present, as she went to service customers at the front of the store. According to Everhart, Agwu started the meeting by saying that "they were there for us." Further, Agwu allegedly told the assembled employees that they knew that "there were issues in the store." However, Agwu did not say what those issues were, other than they were "private." Everhart thinks that Parker "might have said something" about the "issues in the store" being "resolved after investigation." Other than that, Everhart could not recall anything else that was said at the meeting.

During cross-examination by counsel for the Respondent, Everhart acknowledged that she believed the reason that Taylor and Agwu came to the store in April was because Sheritha Grose had some issues with store manager Shaw, and Grose had contacted employee relations to complain. As Agwu and Parker did not testify at the hearing, and Taylor, who did testify, did not discuss his visit to store 1247, Everhart's testimony remains unrebutted.

While the April 24 visit to the store occurred at a time when the Union was organizing that store, the evidence indicates that it was a result of a specific complaint made by team lead Grose. The visit by Employee Relations Managers Taylor and Agwu was consistent with the past practice of the Respondent to immediately address employee complaints and to attempt to remedy them as soon as possible, or to use the Respondent's terminology, to take a "temperature check" of the store.

The Union was not mentioned or discussed during the visit. It seems that the visit was just what it appeared to be, an attempt on the part of the Employee Relations Managers to address Grose's complaint about scheduling, and related issues, and remedy those grievances if possible. The afternoon meeting, during which Regional Manager Parker was also present, as well as Grose and various customer assistants, had the appearance of a "team-huddle," and was consistent with the Employer's policy on how to address issues relating to more than one employee.

The record shows unambiguously that from the time its stores began to open, the Respondent has maintained an active policy and program of having its Employee Relations Managers aggressively seek out employee grievances, with a view to remedying those grievances whenever possible. This is the ultimate open door policy. Further, there is no

evidence that the Respondent's policy of conducting "temperature checks" at the individual stores periodically, or whenever problems arose, was in any way altered by the commencement of the Union's organizational campaign.

As the Respondent had a well established past practice of soliciting and resolving employee grievances, its continuation of that practice during the Union's organizing campaign did not constitute a violation of the Act. *Johnson Tech., Inc., supra; TNT Logistics N. Am., Inc., supra; Wal-Mart Stores, Inc.,* 339 NLRB 1178 (2003); and *Wal-Mart Stores, Inc.,* 340 NLRB 637, 640 (2003). The Respondent was free to continue its past practice of attempted to resolve employee complaints, whether or not the Union was attempting to organize the employees of store 1247. That is precisely what Taylor, Agwu, and Parker were doing on April 24.

These actions by the Respondent's managers did not constitute a violation of the Act, as they merely conformed to the Respondent's past practice. Accordingly, I hereby recommend that complaint paragraph 5(c) be dismissed.

It is alleged in complaint paragraph 5(d) that in the middle of May 2009, the Respondent, by Kelvin Parker, at its East Lake Mead Boulevard, Las Vegas store,[18] promised its employees improved terms and conditions of employment if they refrained from union organizational activities. However, no evidence of such an event was offered at the hearing. Further, in his post-hearing brief, counsel for the General Counsel is silent as to this complaint allegation.

The closest reference to any such event was Parker's presence, along with Taylor and Agwu, on April 24 at store 1247, as part of the "team-huddle" discussed at length immediately above. Parker, as the District Manager for the store, would have normally been present for such a gathering when Employee Relations Managers were visiting the store. I have already concluded that the Respondent's managers were not in violation of the Act when on that date they followed the Respondent's past practice and solicited and listened to employee complaints with the object of attempting to adjust those complaints.

Customer assistance employee Everhart testified that at the store meeting with the Respondent's managers, Parker "might have said something," perhaps that "the issues in the store were going to be resolved after investigation or looking into or something." However, she first indicated that she was "not real sure" what Parker had said. In my view, this testimony is so uncertain as to be entitled to no weight. In any event, as noted, I have already concluded that such statements on the part of the Respondent's managers at store 1247 on April 24 did not violate the Act as a promise of benefit, since the Respondent was merely following its past practice. Accordingly, I hereby recommend that complaint paragraph 5(d) be dismissed.

2. Alleged Sections 8(a)(3) and (4) Conduct

Complaint paragraphs 6(a) and 8 allege that on July 2, 2009, the Respondent violated Section 8(3) of the Act by discharged employee Tamara Williams because of her union activity. As is fully explained above in the fact section of this decision, the Respondent takes the position that it discharged Williams only because she was in violation of the company absentee policy, specifically the no-show/no-call policy, by failing to call into her store before each of the three or more shifts which she missed. Under these circumstances, it is necessary for me to determine the Respondent's motivation in discharging Williams.

[18] Store number 1247.

In *Wright Line, A Division of Wright Line, Inc.,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. This showing must be by a preponderance of the evidence. Then, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board's *Wright Line* test was approved by the United States Supreme Court in *NLRB v. Transportation Corp.,* 462 U.S. 393 (1983).

In the matter before me, I conclude that the General Counsel has made a prima facie showing, although a minimal one, that Williams' protected union activity was a motivating factor in the Respondent's decision to terminate her. In *Tracker Marine, L.L.C.,* 337 NLRB 644 (2002), the Board affirmed the administrative law judge who evaluated the question of the Employer's motivation under the framework established in *Wright Line*. Under that framework, the judge held that the General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the Respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a link, or nexus, between the employee's protected activity and the adverse employment action. In effect, proving these four elements creates a presumption that the adverse employment action violated the Act.[19] To rebut such a presumption, the Respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. See *Mano Electric, Inc.,* 321 NLRB 278, 280 fn. 12 (1996); *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

Williams was engaged in union activity, although limited. Employees Catherine Everhart, Lester Bosiah, and Williams all signed a letter dated June 15, 2009, addressed to the Respondent's CEO, Tim Mason, in which they indicated that there was a "great interest" among the Respondent's employees "in forming a union," and asked for the Employer "to remain neutral" during the organizing process. (Res. Ex. 1.) Everhart testified that the letter was ultimately presented not to Mason, but to a Regional Manager, she believes Al O'Donald, who was visiting the store where she worked.

While counsel for the Respondent does not deny that the Respondent, as an entity, had knowledge of this letter, he argues that there is no evidence that any of the decision makers who subsequently terminated Williams had any knowledge of her union activity. However, I reject this argument, since knowledge by a Regional Manager, or other of the Respondent's managers, must be considered constructive knowledge to the Respondent. I will, therefore, assume that by July 2, the date of her termination, those managers responsible for Williams' termination were aware of her union activity.

[19] More recently, the Board has indicated that, "Board cases typically do not include [the fourth element] as an independent element." *Wal-Mart Stores, Inc.,* 352 NLRB No. 103, fn. 5 (2008), citing *Gelita USA Inc.,* 352 NLRB No 59 fn. 2 (2008); *SFO Good-Nite Inn, LLC,* 352 NLRB No 42 slip op at 2 (2008).

The termination of Williams on July 2 was obviously an adverse employment action. Further, the timing of the termination, two weeks following the presentation of the letter addressed to Mason, which letter demonstrated her union sympathy, is sufficient to establish a nexus between Williams' union activity and her termination. This finding is support by the evidence that the Respondent harbored union animus.

Having found that the Respondent violated Section 8(a)(1) of the Act by maintaining an overly-broad no-distribution policy, and by store manager Barbara Shaw's conduct in unlawfully interrogating employees regarding their union activity and by creating among those employees the impression that their union activities were under surveillance, I conclude that the Respondent has demonstrated animus towards the Union. Such animus, combined with the timing of her discharge, is sufficient to meet the General Counsel's burden of establishing that the Respondent's action in terminating Williams was motivated, at least in part, by her union activity.

The burden now shifts to the Respondent to show that it would have taken the same action absent the protected conduct. *Senior Citizens Coordinating Council of Riverbay Community,* 330 NLRB 1100 (2000); *Regal Recycling, Inc.,* 329 NLRB 355 (1999). The Respondent must persuade by a preponderance of the evidence. *Peter Vitalie Company, Inc.,* 310 NLRB 865, 871 (1993). I am of the view that the Respondent has met this burden.

Earlier, in the fact section of this decision, I set forth in detail the Respondent's no-show/no-call policy, which is a part of its larger absentee policy. That policy is written and available to employees in the Respondent's employee handbook and on its intranet site. However, the General Counsel argues that the policy as written is not the policy as it was applied to Williams and Deana Kenton. As written, counsel for the General Counsel claims that while employees absent from work without permission are expected to call into the store with an excuse, they are only required to call once for consecutive shift absences for the same reason. Although three or more no-show/no-call absences will, under the policy, result in a discharge, the General Counsel contends that a call into an employee's store, stating a reason for the absence, is sufficient notice, regardless of the number of consecutive shifts missed thereafter, as long as the absences are for the same reason. Allegedly, the policy requires only this single contact.

The Respondent disagrees, arguing that the policy requires that an employee absent without permission must call into his/her store prior to the start of the shift to alert management of the absence, and that, significantly, the employee must call in before each missed shift, regardless of whether the shifts are consecutive, and the absences due to the same reason. Each such shift for which there is no call is considered a no-show/no-call absence, after three or more of which consecutive shifts the employee will be terminated.

Director of Employee Relations Yousefian testified credibly that when employees first start work, the requirement that they call in for each day they have an unscheduled absence is communicated to them by management. Further, both Yousefian and Employee Relations Manager Taylor testified that in applying its attendance policy, the Respondent's normal practice has been to terminate the employment of an employee who misses three or more consecutive shifts without calling in before each shift. No evidence was offered to rebut this assertion.

In my view, it is unnecessary to dissect the precise language used by the Respondent in its written no-show/no-call policy contained in the employee handbook and on the intranet site. While the parties may disagree as to the meaning of that language, the evidence regarding the actual practice is unambiguous. In an effort to demonstrate its normal practice concerning the

termination of employees for job abandonment, the Respondent introduced termination documents for 31 employees who had been employed in its Nevada stores. Of those 31 employees who were terminated for job abandonment, 13 were specifically fired for no-show/no-call violations. Of that number, two, David Sexton and Anthony Tienda, were terminated under the Respondent's attendance policy because of jail-related absences. This is significant since both Kenton and Williams were absent from work due to incarceration in the county jail.

For the most part, the records demonstrate that the Respondent has a standard procedure that it follows in terminating employees for job abandonment and, in particular, for no-show/no-call absences. That procedure results in the termination of an employee who fails to call in for each and every shift where there are three or more consecutive absences.[20] In his post-hearing brief, counsel for the General Counsel did not make a serious attempt to show that such a policy and practice, as supported by the voluminous documents, was not in effect.

There is no question that Williams was in violation of the Respondent's no-show/no-call policy as practiced by the Respondent. As is more fully set forth above in the fact section of this decision, Williams was arrested by the police in the early morning hours of June 24. Later that day from jail she did call her store, as she was scheduled to work that day, and asked the employee she spoke with to tell her manager that she was in jail and would be for a few days. In total, Williams was incarcerated for ten days, during which time she did not attempt to again contact her store. Because of her incarceration, Williams did not report for the following scheduled work shifts on June 25, 27, 28, and July 1. While she had the ability to make collect phone calls from the jail, she did not call her store again after the call made the day of her arrest.

By letter dated July 2, Williams was terminated for job abandonment. She had missed 4 shifts without calling in each day to inform her manager of her absences. I find that the Respondent in terminating Williams was following its no-show/no-call practice. A series of emails between Taylor, Employee Relations Manager Agwu, Yousefian, and store manager in training Vanessa Retchless, prior to Williams' discharge, show that the managers were trying to decide what to do about Williams' four no-show/no-call absences. They also demonstrate that unsuccessful efforts had been made to contact Williams. (G.C. Ex. 5.) Regardless of who made the final decision to terminate Williams, whether is was Taylor who signed the termination letter, District Manager Parker, or store manager Megrew, it appears clear to me that the principal motivation behind the termination was Williams' failure to call in prior to each of four consecutive shifts to notify management of her absences.

I doubt that Williams' union activity, minimal as it was, seriously entered into management's decision making process. It is significant to note that Williams' union activity consisted entirely of signing the June 15 letter, along with employees Bosiah and Everhart, addressed to the Respondent's CEO Mason and requesting that the Employer remain neutral in the union campaign. At the time of the hearing, Everhart was still employee by the Respondent, and she testified that Bosiah was too.

In summary, the Respondent has demonstrated by a preponderance of the evidence that even in the absence of Williams' union activity, the Respondent would have fired her because she was in violation of its absentee policy, specifically the no-show/no-call policy. Documentation established that Williams was not treated in a disparate fashion when she was

[20] Of the 13 no-show/no-call terminations, three were ambiguous as to the number of shifts missed where the employee failed to call in. (Res. Ex. 18, 43, and 49.)

fired for failing to call her store manager to report her absences on each day prior to the start of four consecutive shifts. Accordingly, the Respondent has met its burden and rebutted the General Counsel's prima facie case.

Therefore, I shall recommend that complaint paragraph 6(a) be dismissed.

Complaint paragraphs 6(b), 8, and 9 allege that on September 2, 2009, the Respondent violated Sections 8(a)(3) and (4) of the Act by discharging Deana Kenton because of her union activity and because she cooperated with the Agency by filing charges or giving testimony under the Act. As fully explained in the fact section of this decision, the Respondent takes the position that it fired Kenton only because she was in violation of the company absentee policy, specifically the no-show/no-call policy by failing to call into her store before each of three shifts that she missed. Under these circumstances, it is necessary for me to determine the Respondent's motivation in terminating Kenton.

Based on the Board's formula, as set forth in *Wright Line, supra,* and *Tracker Marine, supra,* I conclude that the General Counsel has made a prima facie showing, although a minimal one, that Kenton's union activity was a motivating factor in the Respondent's decision to discharge her. Kenton was engaged in union activity. However, the exact extent of that union activity is unclear.

In his post-hearing brief, counsel for the General Counsel contends that Kenton corresponded with Taylor via email on the subject of the Union. It was during counsel's cross-examination of Yousefian that she testified that Taylor had told her about such emails. Further, Yousefian testified that from her conversation with Taylor, she got the impression that Kenton thought that the Union was "an important entity." However, as is noted above in the fact section of this decision, when, during cross-examination of Yousefian, counsel for the General Counsel offered these emails between Kenton and Taylor for admission into evidence, I sustained counsel for the Respondent's objection and rejected them. I did so because counsel for the General Counsel had failed in his case in chief when, having called Kenton and Taylor as witnesses, he neglected to question them regarding the emails or to have the emails admitted into evidence through their testimony.

Never the less, Yousefian's testimony is sufficient to establish that Kenton thought the Union was "an important entity," and had corresponded with Taylor on the subject of the Union. Further, Kenton had raised the subject of the Union with her store manager, Barbara Shaw, when in May, during a conversation where Kenton was complaining about the reduction in her weekly hours of work, she stated to Shaw that, "This is why we need a union." This union activity on the part of Kenton was obviously known to the Respondent. Yousefian, the Director of Employee Relations, was aware that the Union was important to Kenton, and Kenton had directly informed her store manager of the importance in which she viewed the Union.

The termination of Kenton on September 2 was obviously an adverse employment action. While it is unclear from the record evidence just when Kenton and Taylor had exchanged emails about the Union,[21] presumably it was reasonably close to the time of her

[21] At the request of counsel for the General Counsel, I placed the emails between Kenton and Taylor in the rejected exhibit file. (G.C. Rej. Ex. 17.) The basis for my rejection of this proposed exhibit is explained in full in the fact section of this decision. As a rejected exhibit, this material is not in evidence, and, so, I have not considered the substance of this material in rendering this decision.

termination, likely within the period of the Union's organizational campaign. Her comment to Shaw about needing the Union was made in May, approximately four months prior to her termination. In my view, the timing is sufficient to establish a nexus between Kenton's union activity and her termination. This finding is supported by the evidence that the Respondent harbored union animus.

Having found that the Respondent violated Section 8(a)(1) of the Act by maintaining an overly-broad no-distribution policy, and by store manager Shaw's conduct in unlawfully interrogating employees regarding their union activity and by creating among those employees the impression that their union activities were under surveillance, I conclude that the Respondent has demonstrated animus towards the Union. Such animus, combined with the timing of her discharge, is sufficient to meet the General Counsel's burden of establishing that the Respondent's action in terminating Kenton was motivated, at least in part, by her union activity.

The burden now shifts to the Respondent to show that it would have taken the same action absent the protected conduct. *Senior Citizens Coordinating Council of Riverbay Community, supra; Regal Recycling, Inc., supra.* The Respondent must persuade by a preponderance of the evidence. *Peter Vitalie Company, Inc., supra.* I am of the view that the Respondent has met this burden.

I have noted in detail above, my conclusions regarding the Respondent's absentee policy, specifically its no-show/no-call policy as practiced. Simply put, if an employee has unscheduled absences and fails to call into his/her store each time a shift is missed to explain the absences, the employee will be terminated following the third consecutive shift where there is such a no-call. Unfortunately, Kenton ran afoul of this policy.

On the evening of August 27, Kenton was arrested by the police. Later the next day, she called her store, as she was scheduled to work that day, and spoke with team lead Poindexter. She told him that she was in jail and would not be able to work until released. Apparently that same day, Kenton's aunt also alerted the store that she had been arrested. In any event, although Kenton had the ability to make collect calls from jail, she did not attempt to again contact her store until she was released. In the interim, she missed three consecutive work shifts without calling in before each shift to explain that she was still in jail and would, therefore, not be able to come to work.

Starting on August 30, the Respondent's managers exchanged a series of emails regarding Kenton's status. This email correspondence and the managers involved are set forth in detail in the fact section of this decision. In summary, Taylor recommended that in view of Kenton's violation of the no-show/no-call policy that she be terminated. While Taylor testified that District Manager Parker made the final decision to terminate Kenton, whether that decision was made by Parker, store manager Daemon Smith, Taylor, or collectively by the managers, the termination letter signed by Taylor on September 2 indicates the termination is the result of job abandonment.

Kenton was informed that she was terminated for job abandonment, having missed three consecutive work shifts without calling in before each shift to explain her absences, a violation of the Respondent's no-show/no-call policy. The Respondent's policy as practiced by it at its Nevada stores was fully documented by the Respondent. As is set forth in detail above, the Respondent's records establish that the policy as practiced does require that an employee with unscheduled absences call in before each shift to notify the store of her/his absences. Failure

to do so for three consecutive shifts results in termination. This is so even where the reason for the absences remains the same. Kenton violated this policy and was terminated. There is no evidence of disparate treatment.

Based on the above, I am of the view that the principal reason for Kenton's termination was her violation of the no-show/no-call policy. The Respondent has demonstrated by a preponderance of the evidence that even in the absence of Kenton's union activity, the Respondent would have fired her because of her violation of the absentee policy. Accordingly, the Respondent has met its burden and rebutted the General Counsel's prima facie case regarding Kenton's union activity.

The General Counsel also contends that Kenton was fired because she cooperated with the Board during the investigation of the unfair labor practice charges by the giving of an affidavit to the Agency. However, the problem for the General Counsel is that the record is totally devoid of any evidence that Kenton was in any way involved with the gathering of evidence during the investigation of these charges.

Counsel for the General Counsel called Kenton as a witness and questioned her at length during his case in chief. Inexplicably, at no time did he question Kenton about her alleged cooperation with the Agency during the investigation of these charges. Equally mystifying is counsel for the General Counsel's failure to question the two management witnesses, Taylor and Yousefian, who he called to testify under rule 611(c) of the Federal Rules of Evidence, about their knowledge of Kenton's alleged cooperation with the Agency. Therefore, to what extent, if any, she assisted the Agency in this investigation is totally unknown.[22]

Having failed to provide any probative, admissible evidence of Kenton's alleged cooperation with the Board, and of the Respondent's alleged knowledge of that cooperation, the General Counsel has failed to meet its prima facie burden under *Wright Line, supra,* and its progeny, to establish that the Respondent's termination of Kenton was motivated, at least in part, by her cooperation with the Agency. However, even assuming, *arguendo,* said burden was met by the General Counsel, I conclude that the Respondent has rebutted that burden and established that even in the absence of protected activity it would have terminated Kenton.

In this decision, I have repeatedly set forth the no-show/no-call absentee policy as practiced by the Respondent. Under that policy, Kenton failed to call her store each day for three consecutive shifts to alert the store that she was still incarcerated and unable to work.

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[22] For the reasons fully explained above in the fact section of this decision, I refused to allow counsel for the General Counsel to recall Kenton to testify. Further, for the reasons that I set forth earlier, I rejected a proposed exhibit consisting of a letter from counsel for the General Counsel to counsel for the Respondent issued during the investigation of these charges. As is noted above, if this letter was essential to the General Counsel's case, it would have been prudent for the case to have been tried by a representative of the General Counsel's office who had not authored the letter in question. This letter, which purportedly gave the Respondent's counsel notice of Kenton's cooperation with the Agency, was placed in the rejected exhibit file at the request of counsel for the General Counsel. (G.C. Rej. Ex.16.) As the document is not in evidence, I have not considered the substance of the letter in rendering my decision in this case.

Kenton was, thereafter, terminated pursuant to that policy. I believe that constitutes the principal reason for her termination. As compared to other employees similarly situated, it appears from the record evidence that she was not treated in a disparate fashion. Accordingly, I conclude that as the Respondent would have terminated Kenton even in the absence of her protected activity, the Respondent has by a preponderance of the evidence rebutted the General Counsel's prima facie case.

Therefore, I find that the General Counsel has failed to establish that the Respondent discharged Kenton because of either her union activity or because she cooperated with the Board during the investigatory phase of these unfair labor practice proceedings. Accordingly, I hereby recommend that complaint paragraph 6(b) be dismissed in its entirety.

D. Summary of the Findings

In summary, I have found that the Respondent violated Section 8(a)(1) of the Act, as alleged in complaint paragraphs 5(a), (b) (1), (2), and 7. Further, I have recommended that complaint paragraphs 5(c), (d), 6(a) and (b), and derivatively paragraphs 6(c), (d), 8, and 9 be dismissed.

Conclusions of Law

1. The Respondent, Fresh & Easy Neighborhood Market Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, United Food and Commercial Workers International Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following acts and conduct the Respondent has violated Section 8(a)(1) of the Act:

(a) Promulgating and Maintaining until September 3, 2009, in written form in its employee handbook and on its company intranet site an unlawfully broad no-distribution rule prohibiting the distribution of literature on its premises for any purpose;

(b) Interrogating its employees about their union activities and sympathies; and

(c) Creating an impression among its employees that their union activities were under surveillance.

4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not violated the Act except as set forth above.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act.[23]

As the Respondent has already amended its employee handbook and company intranet site to expunge its unlawfully broad no-distribution rule, it will not be necessary to Order it to do so.

In his post-hearing brief,[24] counsel for the Union requests "extraordinary relief" in the form of: intranet posting of the notice, posting in each of the Respondent's stores, that the notice be signed by the Respondent's President, that the notice be read in all Respondent's stores, and that a broad order issue. However, there is no basis for requiring extraordinary relief in this case. I have found that the Respondent has committed certain unfair labor practices. While all unfair labor practices are serious and need to be remedied, the violations of the Act committed by the Respondent are of the type normally remedied by a standard Board Order and physical notice posting at the locations involved. There is no evidence that the Respondent is a recidivist violator of the Act. Further, there is no evidence of record to support counsel's contention that such an extraordinary remedy is in any way warranted in this case. Accordingly, I am convinced that the standard Board Order and physical notice posting is adequate in this case to remedy the Respondent's unfair labor practices and to protect the rights of its employees. Therefore, I hereby deny the request of counsel for the Union for "extraordinary relief." [25]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

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[23] The unlawful interrogation of employees and the unlawful impression of surveillance given to employees were committed by the Respondent's supervisor at its store number 1247 on East Lake Mead Boulevard, Las Vegas, Nevada. However, as the Union's organizing campaign, during which those unfair labor practices were committed, was directed at all the Respondent's Las Vegas, Nevada area stores, all those stores constitute the appropriate locations for the posting of the notice. While the Respondent's unlawfully broad no-distribution rule was apparently distributed to employees at each of its stores company-wide through the employee handbook and intranet site, the record supports the Respondent's contention that as of September 3, 2009, it had substantially remedied that violation of the Act by expunging the offending language and by conducting "team huddles" at each of its stores to so inform its employees. Therefore, it is not necessary or appropriate to order a company-wide posting of the notice to employees.

[24] Counsel for the Union's post-hearing submission is entitled "Notice of Appearance and Joinder in Brief of Counsel for the General Counsel." It does not independently address the substantive or legal issues in the case, but merely states that the Union joins in the brief of counsel for the General Counsel, and summarily requests the "extraordinary relief" noted.

[25] It should be noted that at the end of his post-hearing brief, counsel for the General Counsel states that the Respondent should be ordered to "post a Notice to Employees substantially in the form of the attached hereto." However, no notice was attached. Therefore, it is unknown what specific remedial language the General Counsel considers appropriate for said notice, and at which specific locations the General Counsel believes notice posting should occur.

[26] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Fresh & Easy Neighborhood Market Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Promulgating and maintaining in its employee handbook and on its company intranet site an unlawfully broad no-distribution rule prohibiting the distribution of literature on its premises for any purpose;

(b) Interrogating its employees about their union activities and sympathies;

(c) Creating an impression among its employees that their union activities were under surveillance; and

(d) In any like and related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days after service by the Region, post at each of its Las Vegas, Nevada, area stores copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any of the stores involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1, 2009; and

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated at Washington, D.C. on February 9, 2010.

Gregory Z. Meyerson
Administrative Law Judge

APPENDIX
NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT coercively question you about your support for or activities on behalf of the United Food and Commercial Workers International Union (the Union), or any other union.

WE WILL NOT make it appear to you that we are watching to see whether you are involved in efforts or activities in support of the Union, or any other union.

WE WILL NOT maintain in our employee handbook or on our intranet site a no-distribution rule that prohibits you from distributing literature on our property for any purpose.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of your rights guaranteed you by Federal labor law.

Fresh & Easy Neighborhood Market Inc.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800
Phoenix, Arizona 85004-3099
Hours: 8:15 a.m. to 4:45 p.m.
602-640-2160.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 602-640-2146.